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7 KERSTINE BRYAN,
8 Plaintiff,
9 v.
10 DEL MONTE FOODS, INC.,
11 Defendant.

Case No. [23-cv-00865-MMC](#)
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**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**
Re: Dkt. No. 31

Before the Court is defendant Del Monte Foods, Inc.’s (“Del Monte”) Motion, filed September 8, 2023, “to Dismiss First Amended Complaint” pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Kerstine Bryan (“Bryan”) has filed opposition, to which Del Monte has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

Del Monte is a Delaware corporation with a principal place of business in California. (See First Am. Class Action Compl. (“FAC”) ¶ 21, Dkt. No. 1.) Bryan, a “citizen of Oregon,” alleges she purchased, “at retailers throughout Oregon,” fruit cups manufactured by Del Monte, specifically, “Mango Chunks and Peach Chunks,” and that she did so in reliance on an assertedly false and misleading statement made on their respective front labels. (See FAC ¶ 20.)

Specifically, Bryan alleges that in purchasing the fruit cups, she saw and relied on the phrase “fruit naturals,” with a bolded emphasis on “naturals” (see FAC ¶¶ 42, 43),

¹ By order filed October 16, 2023, the Court took the matter under submission.

1 which she understood to mean the products “contained only natural ingredients” (see
 2 FAC ¶ 44), when, in fact, they “contain[ed] multiple synthetic ingredients,” including citric
 3 acid, potassium sorbate, sodium benzoate, and methylcellulose gum (see FAC ¶¶ 49-50).
 4 Bryan further alleges that other Del Monte products (hereinafter, together with Mango
 5 Chunks and Peach Chunks, the “Products”) include the same “fruit naturals” phrase on
 6 their front labels, despite containing the same synthetic ingredients. (See FAC ¶¶ 1 n.1,
 7 42, 50.)

8 Based on said allegations, Bryan, on her own behalf and on behalf of two putative
 9 classes, asserts the following three claims for relief: (1) “Violation of California’s Unfair
 10 Competition Law (‘UCL’), Cal. Bus. & Prof. Code § 17200, et seq.” (Count I);²
 11 (2) “Violation of The False Advertising Law (‘FAL’), Cal. Bus. & Prof. Code § 17500, et
 12 seq.” (Count II);³ (3) “Violation of Oregon’s Unlawful Trade Practices Act (‘UTPA’)” (Count
 13 III).⁴

14 By the instant motion, Del Monte seeks an order dismissing the FAC in its entirety
 15 for failure to state a claim.⁵

16
 17 ² Bryan asserts the UCL claim on her own behalf and on behalf of a “Nationwide
 18 Class” comprised of “[a]ll persons who purchased [Del Monte’s] Products within the
 19 United States and within the applicable statute of limitations period.” (See FAC ¶¶ 69b,
 20 79.)

21 ³ Bryan asserts the FAL claim on her own behalf and on behalf of the Nationwide
 22 Class. (See FAC ¶ 88.)

23 ⁴ Bryan asserts the UTPA claim on her own behalf and on behalf of an “Oregon
 24 Class” comprised of “[a]ll persons who purchased [Del Monte’s] Products within the State
 25 of Oregon and within the applicable statute of limitations period.” (See FAC ¶¶ 69a, 98.)

26 ⁵ Bryan argues Del Monte’s motion is “procedurally improper” in that it “is a motion
 27 for reconsideration presented under the guise of a Rule 12 motion.” (See Pl.’s Opp’n to
 28 Def.’s Mot. to Dismiss FAC (“Pl.’s Opp’n”) at 1:4-5, 3:13, Dkt. No. 38.) Del Monte,
 however, is “not seeking reconsideration of the Court’s prior [o]rder, but rather is
 responding to [the] new complaint.” See Bruton v. Gerber Prod. Co., 2014 WL 172111,
 at *7 n.2 (N.D. Cal. Jan. 15, 2014) (explaining “amended complaint supercedes the
 original complaint and renders it without legal effect”); see also Sidebotham v. Robison,
 216 F.2d 816, 823 (9th Cir. 1954) (holding “on filing a third amended complaint which
 carried over the causes of action of the second amended complaint, the [defendants]
 were free to challenge the entire new complaint”); In re Sony Grand Wega KDF-E
A10/A20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1098
 (S.D. Cal. 2010) (holding court not barred “from considering [defendant’s] motion to

LEGAL STANDARD

2 Dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal
3 theory or the absence of sufficient facts alleged under a cognizable legal theory.” See
4 Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2),
5 however, “requires only ‘a short and plain statement of the claim showing that the pleader
6 is entitled to relief.’” See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)
7 (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a complaint attacked by a Rule 12(b)(6)
8 motion to dismiss does not need detailed factual allegations.” See id. Nonetheless, “a
9 plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than .
10 . . a formulaic recitation of the elements of a cause of action.” See id. (internal quotation,
11 citation, and alteration omitted).

12 In analyzing a motion to dismiss, a district court must accept as true all material
13 allegations in the complaint and construe them in the light most favorable to the
14 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To
15 survive a motion to dismiss,” however, “a complaint must contain sufficient factual
16 material, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
17 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual
18 allegations must be enough to raise a right to relief above the speculative level,”
19 Twombly, 550 U.S. at 555, and courts “are not bound to accept as true a legal conclusion
20 couched as a factual allegation,” see Iqbal, 556 U.S. at 678 (internal quotation and
21 citation omitted).

DISCUSSION

23 There is no dispute that each of the above-listed claims is “governed by the
24 reasonable consumer test,” see Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th
25 Cir. 2008) (internal quotation and citation omitted), under which a plaintiff must “show that

27 "dismiss" claim that had already withstood previous motion to dismiss; noting "[r]ather than
28 proceed with only th[at] claim . . . , [p]laintiffs chose to file an amended complaint").

1 members of the public are likely to be deceived" by the challenged representation, see id.
2 (internal quotation and citation omitted).

3 In the instant motion, Del Monte argues that "no reasonable consumer would be
4 misled by Del Monte's Products' labels as a matter of law." (See Def.'s Mot. to Dismiss
5 FAC ("Def.'s Mot.") at 2:22-23, Dkt. No. 31.) In support thereof, Del Monte relies on
6 McGinity v. Procter & Gamble Co., 69 F.4th 1093 (9th Cir. 2023), a decision issued on
7 June 9, 2023, after Del Monte's motion to dismiss Bryan's initial complaint and Bryan's
8 opposition thereto had been filed, in which decision the Ninth Circuit holds that where "a
9 front label is ambiguous," courts "must consider what additional information other than
10 the front label was available to consumers of [defendant's] products," see id. at 1098-99
11 (noting "the ambiguity can be resolved by reference to the back label"). In McGinity, the
12 Ninth Circuit found a front label's use of the phrase "Nature Fusion" ambiguous, in that
13 "[u]nlike a label declaring that a product is '100% natural' or 'all natural,' the front 'Nature
14 Fusion' label d[id] not promise that the product is wholly natural." See id. at 1098. Here,
15 the front label's statement, "fruit naturals," like the label considered in McGinity, does not
16 "make any affirmative promise about what proportion of the ingredients are natural," see
17 id., and, as in McGinity, the Court finds such ambiguity can be resolved by reference to
18 the back label,⁶ which clearly discloses the inclusion of multiple synthetic ingredients (see
19 Decl. of Erik K. Swanholz, Exs. A, B, Dkt. No. 31-1 (images of Peach Chunks' and Mango
20 Chunks' back labels, with citric acid, potassium sorbate, and sodium benzoate listed as
21 ingredients)).⁷

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23 ⁶ In the FAC, Bryan makes reference to the Products' "ingredients label" (see FAC
24 ¶ 51), and both parties, in their respective briefing, rely thereon. See Parrino v. FHP,
25 Inc., 146 F.3d 699, 706 (9th Cir. 1998), as amended (July 28, 1998) (holding "a district
court ruling on a motion to dismiss may consider a document the authenticity of which is
not contested, and upon which the plaintiff's complaint necessarily relies").

26 ⁷ Although, as Bryan points out, the Court, in its previous order, found "the
27 ingredient list's inclusion of synthetic ingredients d[id] not support dismissal of Bryan's
28 claims," see Bryan v. Del Monte Foods, Inc., 2023 WL 4758452, at *6 (N.D. Cal. July 25,
2023), Del Monte's earlier argument was based primarily on the front label's inclusion of
the phrase "packed in light syrup," which Del Monte argued, unconvincingly, "specifically
disclaims that all ingredients in the Products are natural," see id. at *5. In any event, the

1 In her opposition, Bryan, citing Souter v. Edgewell Pers. Care Co., 2023 WL
2 5011747 (9th Cir. Aug. 7, 2023); see id. at *2 (noting “[t]he ordinary reasonable consumer
3 has ‘very little scientific background’”), argues that “[t]he ordinary reasonable consumer is
4 not aware of an ingredient’s status as synthetic or natural based solely on the ingredient’s
5 name” (see Pl.’s Opp’n at 6:3-6). Souter, however, did not address a reasonable
6 consumer’s understanding of synthetic ingredients, but rather, such consumer’s “scientific
7 wherewithal to discern which pathogens can and cannot be killed by handwashing.” See
8 Souter, 2023 WL 5011747, at *2 n.2 (considering label’s representation as to hand wipes’
9 efficacy). Bryan points to no case wherein a court has held any consumer, let alone one
10 concerned about synthetic ingredients, would not be able to distinguish a synthetic
11 ingredient from a natural ingredient.

12 Moreover, “[g]eneral knowledge and common sense” may serve to “inform the
13 reasonable consumer considering a product.” See Robles v. GOJO Indus., Inc., 2023
14 WL 4946601, at *2 (9th Cir. Aug. 3, 2023) (holding “reasonable consumer would not
15 expect [low-cost hand sanitizer] to kill germs . . . that are not found on the hands”). Here,
16 as Del Monte notes, Bryan does not allege there are “any comparable single serve fruit
17 products available on the market that do not contain any artificial sweeteners or
18 preservatives.” (See Def.’s Mot. at 7:20-21.)

19 Lastly, the publicly available consumer surveys on which Bryan relies do not save
20 her claims. Those surveys do not address a consumer’s understanding of the noun
21 “naturals” used as part of a product’s name, as is alleged here, but, rather, appear to
22 address a consumer’s understanding of the word “natural” used as an adjective to
23 describe a product. (See FAC ¶¶ 39-40); see also McGinity, 69 F.4th at 1099 (declining
24 to consider survey that “d[id] not adequately address the primary question in th[e] case”);
25 Becerra v. Dr Pepper/Seven Up, Inc., 945 F.3d 1225, 1231 (9th Cir. 2019) (holding

27 Court has the “power to revisit, revise, or rescind an interlocutory order prior to entry of
28 final judgment in [a] case.” See In re Sony, 758 F. Supp. 2d at 1098 (internal quotation
and citation omitted).

1 "survey cannot, on its own, salvage [plaintiff's] claim" where survey "does not address
2 [relevant] understanding").

3 In sum, the Court cannot say that the front label is "unambiguously deceptive,"
4 such that Del Monte is "precluded from insisting that the back label be considered
5 together with the front label," see McGinity, 69 F.4th at 1098, and Bryan has not plausibly
6 alleged that the Products' front label, as clarified by the back label, would mislead a
7 reasonable consumer into thinking that the Products contain no synthetic ingredients.

8 Accordingly, the FAC is subject to dismissal for failure to state a claim. See
9 Robles, 2023 WL 4946601, at *2 (affirming dismissal where plaintiff "never plausibly
10 allege[d] that the [front label] claim, as clarified by the back label, [wa]s false or
11 misleading"); Steinberg v. Icelandic Provisions, Inc., 2023 WL 3918257, at *1 (9th Cir.
12 June 9, 2023) (affirming dismissal of complaint that "fail[ed] to allege that the product's
13 front label would deceive a reasonable consumer to believe that the product is
14 manufactured in Iceland" where back label "state[d] that the product is manufactured in
15 New York").

16 Although Bryan seeks leave to amend whatever claims may be found deficient,
17 she provides no elaboration in support thereof, either as to any new allegations or other
18 potential additions, and, accordingly, such request will be denied.

19 CONCLUSION

20 For the reasons stated above, Del Monte's motion to dismiss the FAC is hereby
21 GRANTED, and the FAC is hereby DISMISSED without further leave to amend.

23 IT IS SO ORDERED.

25 Dated: October 19, 2023


26 MAXINE M. CHESNEY
United States District Judge